BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VICTOR L. GENTEMAN	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,032,806
ALLEN MILLWORK COMPANY	)	& 1,032,807
Respondent	)	
AND	)	
	)	
MIDWEST INSURANCE COMPANY, INC., and COMMERCE & INDUSTRY INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent and its insurance carrier, Commerce & Industry Insurance Company, appeal the April 18, 2007 preliminary hearing Orders of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded benefits in the form of medical treatment with Michael H. Munhall, M.D., as the authorized treating physician and temporary total disability compensation if taken off work by the authorized treating physician. The Administrative Law Judge (ALJ) determined that claimant had provided timely notice of the accident and timely written claim.

Claimant appeared by his attorney, David H. Farris of Wichita, Kansas. Respondent and its insurance carrier Commerce & Industry Insurance Company appeared by their attorney Jon E. Newman of Wichita, Kansas. Respondent and its insurance carrier Midwest Insurance Company appeared by their attorney, Timothy C. Gaarder of Kansas City, Kansas. The Appeals Board (Board) adopts the same stipulations as did the ALJ. The Board considered the same record as the ALJ, consisting of the Preliminary Hearing transcript of April 17, 2007, with the attached exhibits, and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer accidental injuries to his right knee and bilateral upper extremities arising out of and in the course of his employment

with respondent? The ALJ made no findings with regard to these issues, but she did award claimant benefits, which supposes that she determined these issues in claimant's favor. Respondent argues claimant's right knee condition was preexisting and is the result of an earlier diagnosed gout condition. Claimant contends that he suffered a traumatic injury to his right knee in May 2006 when he turned while carrying a 100-pound piece of fiberboard. Claimant contends that his knee continued to worsen as a result of his duties with respondent. Respondent also contends claimant's upper extremity conditions preexisted his alleged dates of accident. Claimant contends his upper extremity conditions were aggravated by his work for respondent. Respondent further argues claimant was involved in an intervening motorcycle accident which aggravated his knee and upper extremity injuries.

2. Did claimant provide timely notice of his alleged accidents? Respondent argues that claimant failed to notify his supervisors of his alleged accidents until his attorney sent a letter to respondent which respondent received on January 23, 2007. Claimant alleges he told his supervisor of these knee and back problems soon after the symptoms began.

3. Did claimant provide timely written claim of his alleged accidents? Respondent argues claimant was untimely in his written claim as his accident to his knee occurred, if at all, in May 2006, which is more than 200 days before January 23, 2007, the date the letter was received by respondent. Respondent argues that claimant's alleged injuries to his upper extremities have no proven date or dates of accident.

4. Does the Board have jurisdiction to determine the appropriate date or dates of accident on an appeal from a preliminary hearing? K.S.A. 2006 Supp. 44-508(d) sets forth the criteria for determining the date of accident when a series of injuries is claimed. Respondent and its insurance carrier Midwest Insurance Company, Inc., argue that the Board does not have the jurisdiction to determine the date of accident on appeal from a preliminary hearing order. Claimant contends the Board must determine the date of accident in order to decide both timely notice and timely written claim.

5. Did the ALJ exceed her jurisdiction in appointing Dr. Munhall as the authorized treating physician?

6. Does claimant's March 2007 motorcycle accident constitute an intervening accident sufficient to prevent claimant from collecting workers compensation benefits for the injuries alleged while working for respondent?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Orders should be affirmed in part, with respondent's appeal of the authorization of Dr. Munhall to be dismissed.

Claimant, a carpenter, had worked for respondent for 6½ years when, in May 2006, while carrying a 4' x 8' sheet of particle board, claimant twisted and felt a pop in his right knee. He experienced immediate pain in the knee. Claimant alleges he told Jerry Allen, respondent's owner, of the accident within a week of the accident. Mr. Allen denies being told of any work accident related to claimant's right knee until after claimant's attorney contacted respondent in January 2007.

Claimant sought medical treatment with his primary health care physician, Timothy S. Wolff, D.O., of Riverside Health Systems, on May 24, 2006. The medical notes from that visit do not mention a work-related connection to claimant's knee complaints. However, a May 9, 2006 entry in respondent's injury and illness daily call-in log[1] notes claimant went home to put ice on his knee. The entry states "Swollen does not [*sic*] what he did".[2] The entry in Dr. Wolff's records does note a possible connection to claimant's pre-existing gout. But the entries in respondent's log before May 2006, whenever mentioning claimant's gout, focus on claimant's foot and not his knee. Claimant also testified the gout did not affect his knee.

Dr. Wolff, concerned that claimant may have a meniscus tear, referred claimant to Jay Stanley Jones, M.D., of the Clifton Medical Center. Dr. Jones' medical note of July 26, 2006, notes right knee pain and swelling, but with no known injury. Dr. Jones also noted that claimant was experiencing bilateral hand pain and cramping, and pain into his arms. These symptoms had been present for years. Claimant was recommended for nerve conduction tests and an MRI of the knee. Dr. Jones' office contacted respondent on August 1, 2006, and requested claimant's treatment be authorized through workers compensation. This request was denied as respondent had no information regarding a work-related accident or accidents. When claimant contacted Dr. Jones' office on August 2, 2006, and was informed of the refusal, the note in his medical file indicates

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[1] P.H. Trans., Resp. Ex. 1.

[2] *Id*.

claimant was upset that he could not file "w/c".[3] Claimant immediately cancelled all future appointments with Dr. Jones' office.

Claimant continued to perform his regular duties for respondent, testifying that his knee continued to worsen with activity. Along with the pain and swelling in the knee, claimant began experiencing clicking and catching. Claimant's upper extremity problems also worsened with work activity. Claimant was ultimately referred by Dr. Wolff to Michael M. Vesali, M.D., for an EMG/nerve conduction study on November 15, 2006. The tests confirmed claimant suffered from severe bilateral median entrapment neuropathy at the wrist.

Claimant continued to perform his regular duties for respondent. However, the injury and illness daily call-in log listed claimant as being absent from work on several occasions due to knee problems. An entry on June 1, 2006, indicated claimant was not sure if he could stand on the knee "all day".[4] Other entries in the daily log noted as follows:

5-29-2006	Knee still blown out - going to Dr. to have it drained since the pills haven't worked - will be backed [*sic*] to work as soon as possible
6-12-2006	Last night his knee went out
6-13-2006	Still losing balance because of his knee
9-26-2006	Don't think I can stand on my knee today
9-28-2006	Still can't put any weight on my leg[5]

Claimant continued with treatment from Dr. Wolff. The first medical record indication of a relationship between claimant's work and his right knee injury is contained in Dr. Wolff's office note of December 27, 2006, which states that claimant is still experiencing right knee pain "work injury".[6] There is no indication in this record whether claimant was provided a copy of that report.

On January 23, 2007, claimant filed two E-1 Applications For Hearings with the Division of Workers Compensation, one for the right knee injury and the other for the injuries suffered to his bilateral upper extremities. The injury dates noted on both E-1s listed July 2006 and each and every working day thereafter.

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[3] P.H. Resp. Ex. 2.

[4] P.H. Trans., Resp. Ex. 1.

[5] *Id*.

[6] P.H. Trans., Cl. Ex. 5.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Michael H. Munhall, M.D., for a medical examination on February 13, 2007. In separate reports from that date,[7] Dr. Munhall diagnosed both claimant's right knee and upper extremity difficulties. With regard to the right knee, Dr. Munhall was told that claimant had suffered a traumatic injury in May 2006 while picking up a 4' x 8' piece of fiberboard. At that time, claimant's knee popped. Claimant described his symptoms, including knee pain which increased during the workday. The examination uncovered knee crepitus and range of motion limitations. Dr. Munhall provided claimant with work restrictions, including sedentary employment, no bending, lifting, squatting, kneeling or stooping, and lifting limits of 10 pounds occasionally and 5 pounds frequently, and no above ground work or stair climbing. Dr. Munhall stated within a reasonable degree of medical probability that there was a causal relationship between claimant's knee problems and the injury sustained in May 2006 while employed with respondent.

Dr. Munhall also examined claimant's upper extremities, diagnosing bilateral carpal tunnel syndrome, bilateral ulnar nerve irritation at the elbows, left thumb pain and left wrist pain. He returned claimant to work with restrictions, including no repetitive activity, and no grasping, pinching or use of vibratory tools. Claimant was allowed only occasional lifting up to 10 pounds and frequent lifting up to 5 pounds. Dr. Munhall stated within a reasonable degree of medical probability that claimant's injuries to his bilateral upper extremities were sustained in July 2006 and each and every day thereafter while employed for respondent. Claimant continues working his regular job with respondent, as respondent has refused to consider the restrictions placed on claimant by Dr. Munhall.

Respondent argues that claimant's injuries are, at least in part, related to a motorcycle accident suffered in March 2007. Claimant acknowledges he was involved in the accident, but suffered only minor injuries as a result. Claimant required no medical treatment after the accident.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[8]

[7] P.H. Trans., Cl. Ex. 1 & Cl. Ex. 2.

[8] K.S.A. 44-501 and K.S.A. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[9]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[10]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[11]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[12]

Claimant's description of his work duties for respondent is uncontradicted. His work involved hand-intensive labor and required the regular use of vibratory hand tools. This led to the development of his upper extremity problems. Dr. Munhall's opinion regarding the cause of claimant's upper extremity problems is persuasive. This Board Member finds claimant suffered a series of injuries to his upper extremities as a result of his work for respondent.

With regard to claimant's knee injury, this Board Member finds claimant's description of the injury to be convincing, although not uncontradicted in this record. Claimant

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[9] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[10] K.S.A. 44-501(a).

[11] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[12] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

regularly handled weights of up to 100 pounds. The act of lifting a 4' x 8' sheet of fiberboard weighing up to 100 pounds would easily put stress on a knee, especially while twisting. Dr. Munhall's opinion regarding the cause of claimant's knee problems is persuasive that claimant suffered an accidental injury arising out of and in the course of his employment in May 2006. There is no medical opinion supporting claimant's contention that he suffered additional injuries throughout his employment with respondent. This Board Member finds claimant suffered a traumatic accident on May 9, 2006, to his right knee, with the resulting injuries arising out of and in the course of claimant's employment with respondent.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[13]

Date of accident is not an issue that the Board has jurisdiction to decide on an appeal from a preliminary hearing order unless a finding is necessary in order to determine whether claimant suffered accidental injury arising out of and in the course of employment, or if notice and/or written claim was timely made.[14]

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[15]

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred

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[13] K.S.A. 44-534a(a)(2).

[14] *Cluck v. Atchison Casting Corp.*, Nos. 204,983 & 265,534, 2002 WL 31602542 (Kan. WCAB Oct. 24, 2002).

[15] K.S.A. 44-520.

> (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .[16]

K.S.A. 2005 Supp. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[17]

K.S.A. 2005 Supp. 44-508(d) goes on to state:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[18]

Claimant suffered a traumatic accident to his right knee in May 2006. This accident is Docket No. 1,032,807. The employer's log notes that claimant went home on May 9, 2006, to ice his knee. This Board Member finds claimant suffered a traumatic injury to his right knee on May 9, 2006.

Claimant testified that he talked to Jerry Allen within one week of the accident and informed him of the knee injury. Mr. Allen denies this conversation, but the entry in the employment log provides support for claimant's position. This Board Member finds

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[16] K.S.A. 44-520a(a).

[17] K.S.A. 2005 Supp. 44-508(d).

[18] K.S.A. 2005 Supp. 44-508(d).

claimant provided notice of the knee accident to Mr. Allen within one week of the incident. This satisfies the requirements of K.S.A. 44-520.

K.S.A. 44-557(a) requires every employer to report accidents of which it has knowledge within 28 days of receiving such knowledge:

> (a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.[19]

Subsection (c) of K.S.A. 44-557 provides:

> (c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.[20]

Respondent was notified of claimant's knee injury within the 10-day limit set by K.S.A. 44-520, but failed to file an accident report as required. Thus, the time limitation for filing written claim is extended to one year from the date of accident. The filing of the E-1 with the Division on January 23, 2007, is within one year of the May 2006 date of accident.

Claimant's series of injuries to his upper extremities, in Docket No. 1,032,806, raises a different problem with regard to the alleged date of accident. K.S.A. 44-508(d), which went into effect July 1, 2005, designates specific events which identify the date of accident when dealing with a series of injuries. The date of accident is either the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. As there was no

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[19] K.S.A. 44-557(a).

[20] K.S.A. 44-557(c).

authorized physician appointed before the preliminary hearing, neither of those events occurred. The next identifier is the date upon which the employee gives written notice to the employer of the injury. In this instance, claimant's attorney filed an E-1 with the Division and provided a letter to respondent on January 23, 2007, notifying respondent of the alleged accidents. The appropriate date of accident for claimant's upper extremity injuries would, therefore, be January 23, 2007, with both notice and written claim being accomplished on that same date.

CONCLUSIONS

Claimant has carried his burden that he suffered an accidental injury to his right knee on May 9, 2006, and to his bilateral upper extremities through a series of microtraumas through January 23, 2007, with timely notice and timely written claim being provided for both the knee injury and the bilateral upper extremity injuries. The alleged intervening motorcycle accident had no effect on claimant's injuries.

Respondent's dispute regarding the appointment of Dr. Munhall as claimant's authorized treating physician is not an issue over which the Board takes jurisdiction on an appeal from a preliminary hearing order. Respondent's appeal on that issue should be dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[21] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Orders of Administrative Law Judge Nelsonna Potts Barnes dated April 18, 2007, should be, and are hereby, affirmed in part, but respondent's appeal of the appointment of Dr. Munhall as claimant's authorized treating physician is dismissed.

IT IS SO ORDERED.

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[21] K.S.A. 44-534a.

Dated this ____ day of July, 2007.

BOARD MEMBER

c: David H. Farris, Attorney for Claimant
Timothy C. Gaarder, Attorney for Respondent and its Insurance Carrier Midwest Insurance Company, Inc.
Jon E. Newman, Attorney for Respondent and its Insurance Carrier Commerce & Industry Insurance Company
Nelsonna Potts Barnes, Administrative Law Judge